(4)

In The

Supreme Court of the United States

No. 04-1336

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents

On Petition to Invoke All Writs Jurisdiction
To The Supreme Court of the State of Florida

REPLY BRIEF OF PETITIONER DELMY SAFIE

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REPLY ARGUMENT

I. TO IGNORE TESTAMENTARY INTENT IS TO DENY A PROTECTED PROPERTY RIGHT

A. The Decedent's Intent Is Not A "Moot" Issue

Of the Respondents in this case, only Carlos Safie writes to oppose the Petition for Writ of Certiorari.

Carlos concedes the Fourteenth Amendment to the United States Constitution should protect his father's right to devise property. That right is not honored in the breach, when a Court prefers an intent expressed in a decades old trust over that in a Will executed a mere six months prior to the Decedent's demise.

Petitioner respectfully suggests this Honorable Court should declare the right to devise property is constitutionally protected. It is a total abrogation of that right for a Court to refuse to adjudicate and enforce a decedent's clear testamentary intent.

Respondent postulates that the lower Florida courts deemed it "unnecessary to get into the vagaries of what Alejandro T. Safie intended by his will." Carlos claims his father's intent was a "moot" issue. *Respondent's Brief, pg 4, fn. 3.* Yet, a cornerstone of Florida Probate law holds that the Decedent's intent is of paramount importance. *See*, *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985); *Westcoast Hospital Assoc. v. Florida National Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958); *Vetrick v. Keating*, 877 So. 2d 54 (Fla. 4th DCA 2004); *First National Bank of Florida v. Moffett*, 479 So. 2d 312, 315 (Fla. 5th DCA 1985) ("in construing wills and trusts, the intent of the testator ... should prevail and effect given to his wishes"). No vagaries exist. The Decedent was clear on his intended disposition for the preferred shares.

Even the authority cited in the Third District's PCA describes the importance of the decedent's intent as the "polestar by which courts must be guided." *Euart v. Yoakley*, 456 So. 2d 1327, 1329 (Fla. 4th DCA 1984). Respondent relegates the importance of his father's testamentary intent to a footnote buried in the middle of his brief. If this Honorable Court finds the Decedent's intent controls, Carlos loses control of Executive National Bank.

B. If Adopted, the Modern Trend Best Protects the Decedent's Right to Devise Property

This appeal is the first to suggest Florida should adopt the modern trend in clarification of *Euart* to resolve conflicting provisions between a Will and a Trust. As the Florida Supreme Court found, "perpetrating an error in legal thinking under the guise of *stare decisis* serves no one well and only undermines the integrity and credibility of the Court." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995).

The modern trend of Trusts was promulgated to better effectuate the Decedent's intent. *See, In re: Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W. 117 (Neb. 2004); *In re: Syverson Trust*, 2003 WL 22016795 (Minn. App. 2003). Respondent dismissed this modern trend as a "red herring" because it has only been adopted by one state thus far. *Respondent's Brief, pg. 3.* In defense, this modern trend is highly specific to these unique facts. *Restatement (Third) of Trusts § 63* cmts. *h and i* (2003); Uniform Trust Code § 602 (c) (2001). More to the point, that is how Restatements and Uniform Codes are adopted – one state at a time.

Respondent does not deny the Decedent intended to dispose of his 1,357 preferred shares of Executive Banking Corporation stock by the 2001 Will. The Will is unambiguous. Moreover, the affidavit of the draftsman of both wills makes this plain. It is preposterous to describe this

affidavit as "a series of unproven allegations." The affidavit is a voluntary statement, made under oath, by a member of the Florida Bar and an Officer of the Court. It asserts facts derived from the Decedent's face-to-face conversations with his estate planning attorney who prepared the 1999 Will which replaced the Trust. This is the same attorney who prepared the 2001 Will to replace the disfavored estate plan expressed in both earlier testamentary documents.

Uncontroverted facts set forth in an affidavit are taken as true for summary judgment purposes. See, *V. P. Clarence Co. v. Colgate*, 115 N.M. 471, 473, 853 P. 2d 722, 724 (N.M. 1993); *Zafft v. Eli Lilly and Co.*, 676 S.W. 2d 241, 243 (MO 1984); *Farrell v. Theriault*, 464 A. 2d 188, 194 (ME 1983). Through this affidavit, the Decedent "speaks" to declare the 2001 Will was intended to prevent the exact result reached by the lower Florida courts.

Petitioner respectfully prays this Honorable Court accepts jurisdiction to review this injustice of constitutional proportion. The intent of the Testator must ultimately prevail for the right to devise property to have consequence. Where that intent is proven but not adjudicated by the Courts, the Due Process protections of the Fourteenth Amendment are offended.

II. THE DECEDENT WAS DENIED A PROTECTED PROPERTY RIGHT WITHOUT DUE PROCESS

This Honorable Court has the authority to determine whether an appellate system unique to Florida has deprived the Decedent of his protected property rights without due process of law. *Missouri v. Lewis*, 101 U.S. 22, 30-31 (1879). On too many occasions, this Court and others have been called upon to correct errors of a Florida District Court which refused to write an opinion. *See*, Steven Krosschell, *DCAs, PCAs and Government in the Darkness*, 1 Fla. Coastal L. J. 13, 31-44 (Spring/ Summer 1999); *Florida v. Rodriguez*, 469

U.S. 1, 105 S.Ct. 308 (U.S. 1984) (reversing a citation PCA that misapprehended controlling principals of law). This responsibility properly belongs to the Florida Supreme Court.

A. Due Process Must Prevail Over the Finality Of A District Court Decision

"District Courts in Florida have been directed in no uncertain terms to leave all judicial changes in the law to the Supreme Court of Florida." *Reichhold Chemicals, Inc. v. Omni-Vest, Inc.*, 352 So. 2d 58, 59 (Fla. 1st DCA 1977); *See also, Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980) ("only the United States Supreme Court and the Florida Supreme Court are an eligible source of law change"). This is not a concept unique to Florida.

The first court in the nation to consider the modern trend of Trusts was an intermediate appellate court from Minnesota. *In re: Syverson Trust*, 2003 WL 22016795 (Minn. App. 2003). This intermediate Court found that "adopting the proposed Restatement (Third) position would change the existing law ... [which] is the role of the supreme court or the legislature, not this court." *Id.* at *4. Had the Third District written an opinion as deferential, this appeal might not be before this Court as the Florida Supreme Court would have jurisdiction to act.

Former Florida Chief Justice Harry Lee Anstead distinguished the jurisdiction of the Florida Supreme Court as "perhaps the most limited of any state high court in the nation." *Bunkley v. State*, 882 So. 2d 890, 918 (in dissent) (Fla. 2004). Merely by refusing to write an opinion, a District Court denies the Florida Supreme Court jurisdiction to review its decision or promulgate new law on questions of first impression. Yet, Justice Anstead recognized "the dictates of due process of law take precedence over the legitimate interest in the finality of district court decisions." *Id.* at. 925.

Respondent's insistence that a District Court's decision was always intended to be final is both misplaced and outdated. *Respondent's Brief, pg. 7-8, citing Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958). *Ansin* was decided decades before the Florida constitution was amended to limit the Supreme Court's jurisdiction. Less than a decade after *Ansin*, Florida Supreme Court Justice Thornal wrote in his dissent: "I would never again accept with finality a decision of a District Court." *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 234 (Fla. 1965).

B. Article V §3(b)(3) Denies the Supreme Court the Right to Decide the Law of Florida

Justice Anstead noted the Florida Supreme Court is empowered "to authoritatively state the law when ... constitutional issues are at stake."[1] *Bunkley*, 882 So. 2d at 924. In her concurring opinion, Florida Supreme Court Justice Linda Ann Wells acknowledged the admonition of Third District Court Judge Gerald G. Cope, Jr., that, under Article V, §3(b)(3), the Florida Supreme Court lacks jurisdiction to review questions of first impression. *Id.* at 904, Fn. 14.

Currently, under Article V, §3(b)(3), a panel of three District Court judges may exceed their primary function of error-correction and decide whether to allow the Supreme Court "to discharge its judicial policy-making function of clarifying the law and promulgating new rules of law." *Bunkley*, 882 So. 2d at 924, *citing Whipple v. State*, 431 So. 2d 1011, 1014 (Fla. 2nd DCA 1983). Justice Anstead

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[1] The right to devise property is protected by the Florida constitution. *Shriner's Hospitals for Crippled Children v. Zrillic*, 562 So.2d 64, 67 (Fla. 1990).

forewarned "the availability and prevalence of the PCA[2] means that a district court could issue an opinion ... and then affirm all other appeals raising that issue through a PCA." *Bunkley*, 882 So. 2d at 925.

Justice Anstead's Due Process concerns are realized in this Appeal. The Third District issued its citation PCA on the authority of another case of first impression decided under materially different facts by the Fourth District. As such, the Florida Supreme Court lacked jurisdiction, even *all writs* jurisdiction, to decide whether the Third District ignored issues of law or misapplied the cited authorities. *See, Safie v. Safie*, 2005 WL 779576 (Fla. 2005), *citing, Persaud v. State*, 838 So. 2d 529, 533 (Fla. 2003). By declining to write an opinion, the Third District denied the Florida Supreme Court its right to review the modern trend of Trusts or the merger doctrine and to pronounce the law of Florida.

C. The Decedent Was Denied Due Process Of Law by an Improvident Citation PCA

1. The Applicability Of the Merger Doctrine Alone Warranted A Written Opinion

This Appeal presents a myriad of questions of first impression and constitutional importance which cannot be resolved by PCA with citations to *Euart v. Yoakley*, (456 So. 2d 1327 (Fla. 4th DCA 1984)) and *Macfarlane v. First National Bank of Miami*, 203 So. 2d 57 (Fla. 3rd DCA 1967).

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[2] In one year alone, the Florida Supreme Court lacked jurisdiction to review over 75% of all criminal appeals due to PCAs and citation PCAs. *Bunkley*, 882 So. 2d at 925, *citing* Judicial Management Council, *Final Report and Recommendations, Committee for Per Curian Affirmed Decisions*, Appendix D-6 (May 2000) (www.flcourts.org/sct/sctdocs/bin/pca-report.pdf).

A prime example is Respondent's brazen argument that twenty-five years ago "the so-called merger doctrine" was superceded by Florida Statute §689.075. *Respondent's Brief, pg. 4.* Respectfully, Respondent does not understand the merger doctrine which explains why recent precedent refutes his claim. In 1999, a United States Bankruptcy Judge held, "the Merger Doctrine has been applied by Florida Courts since at least 1921." *In re: Saber*, 233 B.R. 547, 554 fn. 5, (Bankr. S.D. Fla. 1999); *See also, In re: Wells*, 259 B.R. 776, 779 (Bankr. M.D. Fla. 2001); *Contella v. Contella*, 559 So. 2d 1217, 1218-9, (Fla. 5th DCA 1990); *See generally*, 55A Fla. Jur. 2nd Trusts §28 and §53 (2004).

Absent any discussion of the point in the opinions, neither *Euart* or *Macfarlane* could aspire to be controlling authority on the merger doctrine. As the Decedent acted as both Settlor and sole Trustee, the Trust terminated by operation of law when he claimed sole ownership of the Trust res. *Harvest v. Craft Construction Corp.*, 187 So.2d 72, 74 (Fla. 3d DCA 1966). The merger doctrine terminates the Trust, irrespective of its revocation provisions, once its continued existence is denied by the Settlor and sole Trustee. The Third District denied the Decedent due process in declining to write an opinion to resolve the conflicting positions on this dispositive issue.

2. It Falls To This Court To Correct The Third District's Misapplication Of Law

A District Court misapplies the law "by relying on a decision which involves a factual situation materially at variance with the one under review." *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520, 522 (Fla. 1980); *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986). The Third District misapplied the law as none of the salient facts presented in this appeal were addressed by *Euart* or *Macfarlane*.

Here, the decedent proclaimed personal ownership of the preferred shares in two later Wills. He told his accountant the Trust terminated by its terms in 1999. He prepared the 1999 Will to devise a majority of the shares to Carlos as the Trust had provided. He told his attorneys, a senior Bank officer, and the Federal Reserve Bank which regulates Executive Banking Corporation that he owned the preferred shares personally. After Federal Regulators punished the Bank for Carlos' mismanagement, the Decedent prepared the 2001 Will with the firm belief the Trust was no longer viable.

This is the first Florida case where a decedent, acting as both Settlor and Trustee, devised the Trust res by two later Wills. Both lower Florida courts entirely ignored the merger doctrine and the modern trend which the Florida Supreme Court lacked jurisdiction to address. Perhaps the Florida Supreme Court would not consider this a "waste" of its time as Respondent suggests the Third District so determined. *Respondent's Brief, pg. 4.*

D. The Court's Intervention is Required To Correct The Due Process Violation Caused by Florida's Appellate Procedure

Florida's appellate procedure is constitutionally unsound because it permits review by the United States Supreme Court while depriving the Florida Supreme Court jurisdiction to review the same matter. *Cope*, 45 Fla. L. Rev. at 80. As this infirmity is now written into the Florida Constitution, the errors are for this Court to correct.

Respondent cites no authority which holds Fla. R. App. P. 9.330(a) "gives litigants more process than they are entitled." *Respondent's Brief, pg. 10.* Former Chief Justice England concluded Rule 9.330(a) is flawed on several levels, all of which fail to "ameliorate the consequences" of allowing the District Courts to render decisions without explanation.

Arthur J. England, Jr., *Asking For a Written Opinion From a Court That Has Chosen Not To Write One*,78-Mar Fla. B.J. 10 (March 2004).

If this Honorable Court declines to intercede in this Appeal, it will certainly be called upon to act again in the near future. Florida's District Courts continue to improperly utilize the PCA to dispose of cases without explanation where one is clearly warranted.[3] Moreover, the intermediate appellate courts have little concern for review by a higher court if one District Court judge is speaking for the majority, when he declares: "we can run and we can hide." Steven A. Been, *Letters*, 78-May Fla. B. J. 4 (2004).

This Court can fashion a remedy that comports with Due Process without radically changing Florida's appellate system. The Florida Supreme Court must review questions of importance or first impression, even without the permission of the Third District Court of Appeal. Should this Honorable Court determine the United States Constitution protects the right to devise property, the Decedent was denied that right without Due Process under the present appellate procedure established under Florida law.

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[3] In *Bunkley*, Justice Anstead identified three issues properly raised on appeal which the Second District ignored in refusing to write an opinion. *Bunkley*, 882 So. 2d at 925.

CONCLUSION

Petitioner believes that the Decedent's obvious testamentary intent was not followed. Respectfully, this Honorable Court should find this deprived the Decedent of his protected property right to dispose of the 1,357 preferred shares as he saw fit. The arbitrary result reached by the lower Florida courts offends due process which warrants the acceptance of jurisdiction and an Order that the parties brief their respective arguments.

Petitioner so prays.

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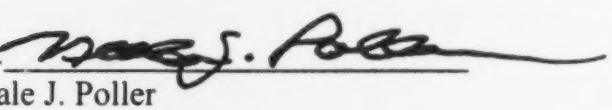
By: 
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